

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Ex Parte Communications

Docket No. RM2016-4

PUBLIC REPRESENTATIVE'S COMMENTS

(February 29, 2016)

I. INTRODUCTION

The Commission recently issued a proposal to revise and reorganize its longstanding rules on ex parte communications.¹ The Commission concurrently filed a separate document, referred to as an internal policy on ex parte communications, as a library reference.² The policy, which the Commission plans to post on the agency's public website upon adoption of the final rules, is referred to in proposed rule 3000.735-501(a), but is otherwise a largely freestanding, self-contained document.

This filing, which includes several attachments, responds to the Commission's invitation for comments on the proposed rules; the structural reorganization (including the elimination of certain rules); and the employee policy in the undersigned's capacity as the Public Representative in this case.

Attachment A presents an Executive Order that supplements the rulemaking record on the early history of the Commission's ex parte rules. Attachments B and C supplement the rulemaking record on the scope of a report prepared by Esa Sferra-Bonistalli for the Administrative Conference (S-F Report) and Administrative Conference Recommendation

¹ See Order No. 3005, Notice of Proposed Rulemaking Regarding Ex Parte Communications, January 8, 2016 (Notice). Order No. 3005 appears at 81 FR 1931 (January 14, 2016).

² See Notice of Filing of Library Reference PRC-LR-RM2016-4/1 (January 14, 2016) and Library Reference PRC-LR-RM2016-4/1.

2014-4. Both documents are cited by the Commission in support of the approach it proposes for the rules and policy.³ Attachment D addresses minor drafting points.

II. SCOPE AND RATIONALE

A. SCOPE AND RATIONALE FOR REVISED RULES

Scope. The proposed rules address ex parte communications in three specific types of proceedings and in "any other matter in which the Commission, in its discretion, determines that it is appropriate to apply" the rules. See Order No. 3005 at 12 (proposed rule 3008.1(b)–(e)). The three types of proceedings are changes in the nature of postal service cases pursuant to 39 U.S.C. § 3661(c); appeals of Postal Service decisions to close or consolidate a post office, pursuant to 39 U.S.C. § 404(d)(5); and rate and service complaints pursuant pursuant to 39 U.S.C. § 3662. *Id.*, (b)–(d). The Commission bases coverage of the three specified types of proceedings on express statutory authority under the PAEA or as legacies of their treatment during the Postal Reform Act (PRA). Order No. 3005 at 3.

Rationale. The stated purpose of the instant rulemaking is to fulfill the Commission's "responsibilities under the Postal Accountability and Enhancement Act (PAEA)." Order No. 3005 at 1. Toward that end, the Commission amends existing rules on ex parte communications, removes obsolete rules, updates the existing rules for consistency with "the recommended approach" to agency treatment of ex parte communications," and reorganizes the rules for clarity.⁴ *Id.* at 1-2.

³ *Ex Parte Communications in Informal Rulemaking*, Esa L. Sferra-Bonistalli, Final Report: May 1, 2014 and Recommendation No. 2014-4 of the Administrative Conference of the United States, June 6, 2014, (Recommendation 2014-4). The S-F Report and Recommendation 2014-4 can be accessed at <https://www.acus.gov>. Excerpts from both documents appear in Attachments B and C.

⁴ The S-F Report and ACUS Recommendation 2014-4 are quite similar, but not identical.

B. Scope and Purpose of Policy

Scope. The Commission states that for all proceedings other than those covered by a statutory prohibition or a prohibition that attaches by regulation, it has self-imposed a prohibition on all ex parte communications. Policy at 9.

Rationale. The decision to prohibit all ex parte communications for all matters not covered by a prohibition in a statute or regulation is based on: (1) the simplicity, consistency, and understandability of having one general policy covering all types of matters before the Commission; (2) the expenditure of the least amount of Commission resources in administering the policy; (3) the presentation of the least legal risk; and (4) the most favorable perception of fairness and equity to persons interacting with the Commission. *Id.* The stated purpose of the internal policy on ex parte communications is "to promote transparency and openness in government concerning interactions with public stakeholders and, in the case of the Commission, with the Postal Service." *Id.* at 1. "Public stakeholders" is a term from the S-F Report that the Commission employs in the proposed rules and policy.

III. FEATURES OF THE COMMISSION'S APPROACH

A. Main Features

The proposed rules and the employee policy, considered as a whole, present a coordinated, comprehensive approach to managing ex parte communications. The main features are:

- limiting coverage of the rules to a few types of proceedings, while covering all proceedings in the policy;
- adopting the broad definition of ex parte communications, subject to specific exceptions, recommended in the S-F Report, in both the rules and the employee policy; and
- providing the remedy of disclosure in both the rules and the policy.

Under the bifurcated approach, given the direction the Commission's workload has taken since enactment of the PAEA, management of ex parte communications in most Commission proceedings will fall under the new policy, not the revised rules.

Differentiation by type of proceeding also results in a distinction in penalties and other matters, such as the ability of the recipient of an ex parte communication covered by the policy to issue a warning which, if heeded, forecloses the attachment of reporting responsibilities; the possibility of a waiver of penalties for matters covered by the policy; and employee sanctions.

B. Other Significant Features

Both the proposed rules and the policy:

- accelerate the point at which ex parte prohibitions explicitly attach by redefining "notice of hearing";
- assign the duty of reporting ex parte communications exclusively to Commission employees; and
- address the treatment of confidential material.

The rules and policy also refer to written (including electronic) communications and written (including electronic) interactions; however, it is not clear whether this change is intended to include social media within the reach of the ex parte rules and policy.

IV. SUMMARY OF POSITION

A. Support for Initiative

The Public Representative supports the Commission's interest in taking a fresh look at the topic of ex parte communications in light of the enactment of the PAEA in 2006, the issuance of recent report commissioned by the Administrative Conference on this topic, and issuance of a related recommendation. Many of the features of the policy provide useful flexibility in managing ex parte communications. The Public Representative also supports the Commission's interest in bringing consistency to the treatment of ex parte communications

and greater clarity to the rules. In short, the Commission's stated objectives are fully consistent with the public interest.

B. Main Concern: Enforceability of Policy

At the same time, the state of the record on a critical decision — limiting coverage of the formal rules of practice and procedure to relatively few types of proceedings, while placing all proceedings under the coverage of an internal policy — is relatively sparse. It appears to be based mainly on the conclusion that the rules should continue to cover "carryover" proceedings in which ex parte rules applied during the PRA due to statute or Commission practice. However, no law or regulation precludes the Commission from covering the newer types of PAEA-era proceedings in the formal ex parte rules, nor prevents the Commission from including in the rules, for these proceedings, the more flexible features that are admirable hallmarks of the policy. Moreover, enforceability of the internal ex parte communications policy as it affects those outside the Commission may be an issue.

The fundamental nature of the freestanding employee policy — which the Commission observes will cover most proceedings — is significantly different from the typical employee policy. The new policy, unlike a telework or administrative leave policy, necessarily brings those outside the agency within its purview in a consequential way, even if the outsiders are not obligated to report prohibited ex parte communications under the proposed rule. In particular, penalties affecting outsiders' interests in a proceeding may attach in the event of breach of the ex parte policy.

The Commission notes that the proposed rule provides notice that the internal policy is available on the agency's Commission's public website, and that the " ...intent of making the policy public is to make external stakeholders aware of how Commission personnel will treat ex parte communications for all proceeding types." Order No. 3005 at 4. It is not clear whether this constitutes valid legal notice of the consequences that can attach to breaches of the ex parte communications policy. Thus, a question arises about the enforceability of at least some aspects of the policy. Moreover, even if legally enforceable, a question arises about the advisability of handling prohibitions against ex parte communications in most

PAEA-era proceedings via policy, rather than formal rules. It seems that the distinctions the Commission draws in the policy for managing ex parte communications in proceedings not covered by statute or regulation could be fully maintained in a set of formal rules.

Apart from this concern, the policy usefully addresses not only standard, but also special situations; allows the recipient of an ex parte communication for the newer, PAEA-era types of proceedings to issue a warning which, if heeded, ends the matter; and allows flexibility in the application of penalties and sanctions. These are desirable features. The Public Representative suggests that the record be supplemented on the question of the enforceability of the policy with respect to outsiders. Moreover, if the Commission concludes the policy is enforceable with respect to outsiders, the Public Representative further suggests that the Commission consider including in the formal rules some of the key components of the policy, especially with respect to the penalties that could attach to persons identified in an ex parte report.⁵

2. Clarification of Other Matters

Rationale for revising the definition of "Notice of Hearing." Further explanation of the rationale for revising the longstanding definition of "notice of hearing" in the APA and in the Commission existing rules would be useful, as this may have ramifications for attachment of the ex parte communications prohibitions. The revised definition accelerates the official starting point for the attachment of prohibitions on ex parte communications. Under the existing rules (which track the APA), the Postal Service's issuance of a request to initiate a proceeding covered by the ex parte rules triggers awareness of an ensuing Commission notice, so the standard interpretation has been that ex parte prohibitions attach upon issuance of the Postal Service's notice (at least for those aware of the Postal Service's notice). A question posed by the revised definition is whether it pushes potential coverage of the ex parte rules (and policy) to an even earlier point. Another question is whether the predictability of some filings under the PAEA, such as the ACR and annual price adjustments,

⁵ This could be accomplished by locating the provisions of proposed Part 3008 in subpart A and key provisions of the policy in subpart B. The policy could be retained.

means that outsiders are always "on notice" that certain proceedings will be held, and that the requisite notices will be filed, and how this might affect coverage of the rules or policy.

Relationship of "electronic" communications and interactions to social media. The proposed rules and internal policy provide that written communications and interactions include "electronic" communications. Both the S-F Report and Recommendation 2014-4 recommend that agencies address the use of social media in their ex parte policies. Point 16 of Recommendation 2014-4, for example, states:

Agencies should state clearly whether they consider social media communications to be ex parte communications and how they plan to treat such communications. Agencies should ensure consistency between policies governing ex parte communications and the use of social media.

It would be useful if the Commission clarified whether "electronic" communications and interactions is intended to capture social media or simply reflects modern document preparation and transmission practices.⁶ If the latter, it would be useful if the Commission explains how the use of social media relates to its proposed ex parte rules and policy.

Late-filed documents. The Policy provides that material filed using the Commission's docketing system shall not be considered an ex parte communication. Policy at 6. However, in part A of Section V, the policy provide that all material that is "timely filed" shall not be considered an ex parte communication. *Id.* It would be useful if the Commission clarified the status of late-filed documents. Specifically, are late-filed documents covered under the exception for material filed using the Commission's docket system?

3. Reorganization of the Rules

The Public Representative supports the proposed reorganization of the ex parte rules, including establishment of a separate part. This continues a practice the Commission has

⁶ The Commission maintains a relatively limited social media footprint in the form of a Twitter account.

successfully employed since enactment of the PAEA. As part of this reorganization and update, the Public Representative suggests conforming the numerical designation of the rules in part 3000 to the rest of CFR, consistent with current OFR current preferences.

V. LEGAL AUTHORITY FOR THE COMMISSION'S ORIGINAL SET OF EX PARTE RULES

A. Introduction

Order No. 3005 includes several references to the types of proceedings covered by the ex parte rules prior to enactment of the PAEA. It also refers to the fact that the existing ex parte rules are located in several places in the title 39 of the Code of Federal Regulations (CFR). See Order No. 3005 at 1. These references support, in part, the Commission's decision to reorganize (and eliminate) some rules and to limit coverage of the formal rules to a limited number of proceedings.

The following discussion clarifies and supplements the rulemaking record on the sources of authority for the original rules. It shows, among other things, that the Commission's extension to "nondecisionmaking personnel" in some situations is not without precedent. It also supports a proposed redesignation of the rules in Part 3000.

B. Sources of Authority for Issuance of Ex Parte Rules

There are typically two ways agencies are statutorily obligated to restrict ex parte communications. One is through an enabling statute's use of the phrase "a hearing on the record with the opportunity for a hearing" to describe the type of proceeding an agency is to conduct for a certain matter. This phrase triggers the formal, trial-type rulemaking provisions of the Administrative Procedure Act (APA), and prohibitions against ex parte communications typically associated with judicial proceedings therefore attach. The other way is by an explicit direction to the agency in the enabling statute, with or without the APA "magic" phrase. However, as discussed below, the Commission's original ex parte rules reflect a rare — and perhaps unique — third avenue: a Presidential Executive Order.

C. The "Third Avenue" and Civil Service Commission Involvement

In an early PRA-era law review article entitled *Postal Reform: Some Legal and Practical Considerations*, the authors observed:

The [Postal Reorganization] Act [of 1970] is silent on what limits or controls should be set with regard to contacts by individuals or groups having an interest in the decisions of the Commission and the Service. However, Congressmen David Henderson of North Carolina and Morris Udall of Arizona, in a letter to the President on August 12, 1970, stated that the [Postal] Rate Commission should incorporate Executive Order No. 11222, and go even further in establishing a code of conduct.⁷

The authors noted that President Nixon dealt with this request on November 24, 1970, through issuance of Executive Order No. 11570, captioned *Providing for the Regulation of Conduct for the Postal Rate Commission and its Employees*.⁸

Pursuant to the Executive Order, the Commission was subject to Executive Order No. 11222. The Civil Service Commission was authorized to prepare standards of conduct regulations for the Postal Rate Commission and, in the case of ex parte contacts, to provide for strict control of ex parte contacts with the Commission and the Commissioners or employees of the Commission regarding particular matters at issue in contested proceedings before the Commission. The Executive Order further provided that the Postal Rate Commission could subsequently amend the regulations, *consistent with the Executive Order*.⁹ (Emphasis supplied.)

A review of early PRA-era documents indicates that the Commission issued its set of ex parte regulations in January 1971 (in part 3001 of title 39 of the Code of Federal Regulations (CFR)) and the Civil Service Commission, pursuant to the President's mandate

⁷ See Robert A. Saltzstein and Ronald E. Resh, 12 Wm. & Mary L. Rev. (1971) at 784; <http://scholarship.law.wm.edu/wmlr/vol12/iss4/4>. The Udall-Henderson letter was sent to the President on the same day the PRA was enacted.

⁸ Executive Order No. 11570 was published at 35 FR 18133 (1970).

⁹ The 120-day deadline was likely imposed to ensure that the regulations were on the books before the Postal Service began formal operations on July 1, 1971.

in Executive Order No. 11570, issued its regulations on March 23, 1971. The CSC-drafted rules, organized into subparts A through E, were codified in Part 3000 of title 39 of the CFR. Part 3000 also included, as Appendix A, the then-controlling Code of Ethics for Government Ethics. Subpart E, captioned "Ex Parte Communications," consisted of two provisions.¹⁰

CSC-drafted rule 3000.735-501 reads as follows:

An employee shall not, either in an official or unofficial capacity, participate in any ex parte communication—either oral or written — with any person regarding (a) a particular matter (substantive or procedural) at issue in contested proceedings before the Commission or (b) the substantive merits of a matter that is likely to become a particular matter at issue in contested proceedings before the Commission. A particular matter is at issue in contested proceedings before the Commission when it is a subject of controversy in a hearing held under 39 U.S.C. 3624 or 3661(c). However, this section does not prohibit participation in off-the-record proceedings conducted under regulations held under 39 U.S.C. 3624 or 3661(c).

39 CFR 3000.735-501.

Thus, the text of the CSC-developed rule was faithful to the wording of the Executive Order, which referred to "all Commission employees." It also included both substantive and procedural matters. "Contested proceedings" were those held under 39 U.S.C. 3624 or 3661(c).

The CSC's strict interpretation of the Executive Order led to an early controversy because the extension of coverage to all Commission employees drew the Commission's litigating staff with the ex parte prohibitions. (The ordinary expectation would be that the litigating staff could discuss procedural and substantive matters with the Postal Service and others.) After a considered review, the original ex parte rules were amended to exempt personnel in the Commission's litigation division (later known as the Office of the Consumer Advocate) were exempted from coverage.

¹⁰ The provisions were designated 39 CFR §§ 3000.735-501 and 3001.735-502.

Since then, except for relatively minor conforming changes, the ex parte rules have remained in the CFR largely as originally drafted (with slight evidence of compliance issues), notwithstanding the sea change in the nature, scope, and number of Commission proceedings since enactment of the Postal Accountability and Enhancement Act (PAEA) of 2006.¹¹

As the citations to the original rules illustrate, the CSC's involvement in the issuance of the early ex parte rules led to a technical difference in how the rules were designated. Specifically, the CSC-drafted rules followed the more elaborate CSC numbering convention: use of "3000" (for the part), plus a six-digit, hyphenated extension. The Commission's original ex parte rules reflected a much simpler format: the part number followed by one or two digits.¹² The CSC format, while still retained in the Commission's rules, is no longer consistent with Office of the Federal Register style.

VI. THE ADMINISTRATIVE CONFERENCE

A Introduction

The Commission indicates that its update to the existing rules was influenced by the approach discussed in the S-F Report, which was prepared for the consideration of the Administrative Conference, and in related ACUS Recommendation 2014-4. See Order No. 3005 at 1-2. As the general public may not be familiar with the role of the Administrative Conference, some basic information on its role is provided.

B. The Role of Administrative Conference

The Administrative Conference is an independent federal agency within the Executive Branch. It was established in the Administrative Conference Act of 1964, began operating in

¹¹ The conclusion about compliance is based on a search of Commission's electronic docket room employing "ex parte" and a preliminary review of the search results.

¹² See 36 FR 5412, March 23, 1971.

1968, and has functioned since then as a valuable resource for federal agencies and others interested in effective government.¹³ The agency's website describes ACUS as:

...dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures.

[https://www.ACUS.gov/.tab "Conference, About ACUS"](https://www.ACUS.gov/.tab%20Conference,AboutACUS)

The ACUS website notes that one of the Administrative Conference's chief activities is making formal recommendations, and states that the Conference conducts an extensive research program to support this effort. The results of the research are typically included in Conference recommendations for improving administrative procedure, although recommendations may not adopt all research findings and suggestions. Depending on the topic, recommendations may be directed to Congress, the President, agencies, or the courts. (In the case of Recommendation 2014-4, federal agencies are the main focus.) However, Administrative Conference recommendations, while authoritative and often persuasive, are advisory because the Administrative Conference does not have the power to compel their adoption.

C. The S-F Report

The S-F Report consists of 88 pages, plus three appendices. The Executive Summary of this report is provided for reference in Attachment B. The S-F Report makes twelve recommendations. The recommendations of particular interest here are that agencies:

- adopt written *ex parte* communications policies
- define "*ex parte* communication" broadly (and provides a suggested definition)
- place the burden of disclosing *ex parte* communications on "public

¹³ The Administrative Conference ceased operations for a time due to defunding.

stakeholders"

- exempt confidential or otherwise protected information from *ex parte* disclosures, and
- use digital technology to disclose *ex parte* communications and address its use for *ex parte* communications, including through social media.

D. Administrative Conference Recommendation 2014-4

ACUS Recommendation 2014-4 addresses *ex parte* communications in informal rulemaking, so it mainly concerns federal agencies that engage in this activity pursuant to the Administrative Procedure Act (APA) and interested persons outside these agencies. Introductory material in ACUS Recommendation 2014-4 states: "Although the APA prohibits *ex parte* contacts in formal adjudications and formal rulemakings conducted under the trial-like procedures of 5 U.S.C. 556 and 557, 5 U.S.C. 553 imposes no comparable restriction in the context of informal rulemaking." ACUS Recommendation 2014-4 at 1 (Internal footnote omitted.)

Recommendation 2014-4's introductory material further observes:

The term "*ex parte*" does not entirely fit in this non-adversarial context, and some agencies do not use it. This recommendation uses the term because it is commonly used and widely understood in connection with informal rulemaking. As used in this recommendation, "*ex parte* communications" means: (1) written or oral communications; (ii) regarding the substance of an anticipated or ongoing rulemaking; (iii) between the agency personnel and interested persons; and (iv) that are not placed in the rulemaking docket at the time they occur.

Id. at 1.

One of the few differences between ACUS Recommendation 2014-4 and the S-F Report is that the former does not adopt the definition of *ex parte* communication used in the S-F Report. The text of the 16-point ACUS recommendation appears in Attachment C.

VII. PROPOSED REORGANIZATION

The Commission observes that the ex parte rules currently appear in three areas of title 39 of the CFR, and proposes consolidation, elimination of obsolete rules, and establishment of a new part 3008. Order at 2. Specifically, the Commission proposes replacing, in their entirety, the rules currently appearing in subpart B of part 3000 in title 39, CFR with rules with new text. *Id.* It also proposes reorganizing the rules in rule 3001.7, including a definition appearing at 3001.5(o), and to relocate this material in a new part 3008 of title 39 of the CFR. *Id.*

The Public Representative supports establishment of a new part 3008 within title 39 of the Code of Federal Regulations for the proposed rules (and additional provision the PR suggests are necessary and appropriate). As the Commission observes, there is significant redundancy between this requirement and the requirements of existing rule 3001.7. This change is also consistent with the Commission's past practice with respect to revisions to the CFR since enactment of the PAEA. This approach also allows interested members of the general public to readily locate all applicable rules.

In addition, as stated earlier, the involvement of the Civil Service Commission in the development of the Commission's ex parte rules has led to a discrepancy in the formatting of the rules in parts 3000 and 3001 of title 39 of the CFR. This appears to be an opportune time to conform the numbering of all of the sections subparts A and B in part 3000 to the rest of the Commission's rules and to the Office of Federal Register's publication style.¹⁴ A simple, straightforward approach would be to replace each hyphenated six-digit extension with a standard one or two digit extension. This change would not require a new notice because it is not a substantive change.

¹⁴ The OFR's Document Drafting Handbook addresses the numbering of rules in section 1.12. This section states: "Hyphenated numbers (§117-2.1 or §117-3.15) or numbers with alpha characters (part 115a, §115a.1, or §115.1a) are not permitted in designating units within the CFR system."

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

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Attachment A
Executive Order 11570

Executive Order 11570--Providing for the regulation of conduct for the Postal Rate Commission and its employees

Source: The provisions of Executive Order 11570 of Nov. 24, 1970, appear at 35 FR 18183, 3 CFR, 1966-1970 Comp., p. 981, unless otherwise noted.

Under the Postal Reorganization Act (Public Law 91-375), the Postal Rate Commission (referred to hereafter as the "Commission") is charged with the establishment and adjustment of fair and equitable rates of postage, fees for postal services, and classifications of mail. It is essential to public confidence in the United States Postal Service that the activities, procedures, decisions, and recommendations of the Commission be impartial and disinterested and free from taint or suspicion of favoritism of any kind whatsoever, both in fact and in appearance.

NOW THEREFORE, by virtue of the authority vested in me by Section 301 of Title 3, and Section 7301 of Title 5, United States Code, and the Postal Reorganization Act, it is hereby ordered as follows:

Section 101. The Commission is subject to Executive Order No. 11222 of May 8, 1965, "Prescribing Standards of Ethical Conduct for Government Officers and Employees," and Part 735 of the regulations of the Office of Personnel Management (5 CFR Part 735).

Sec. 102. The Office of Personnel Management shall prepare initial standards of conduct regulations for the Commission. The regulations shall contain such provisions as will ensure that the Commissioners and employees of the Commission are fully guarded against involvement in conflicts of interest situations, or the appearance thereof, or other conduct that may lessen public confidence. The regulations shall include provision for:

- (a) concurrent filing of confidential statements of outside employment and financial interests by employees of the Commission with a designated official of the Commission and the Director of the Office of Personnel Management;
- (b) strict control of *ex parte* contacts with the Commission and the Commissioners or employees of the Commission regarding particular matters at issue in contested proceedings before the Commission. The control of such contacts shall include, but not be limited to, the maintenance of public records of such contacts which fully identify the individuals involved and the nature of the subject matter discussed; and
- (c) prohibition against the receipt of honoraria, travel expenses, entertainment, gifts, loans, favors, or anything of value by a Commissioner or employee of the Commission from an individual (other than one having a close family or personal relationship) or organization having, or likely to have, business with the Commission.

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Attachment A
Executive Order 11570

Sec. 103. The Office of Personnel Management shall issue the initial standards of conduct regulations applicable to the Commission not later than 120 days after the effective date of this Order. Thereafter, the Commission may from time to time amend the regulations, consistent with this Order. The regulations and any amendments thereto shall be published in the **Federal Register**.

[EO 11570 amended by Executive Order 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

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Attachment B
S-F Report Executive Summary

Ex Parte Communications in Informal Rulemaking



Esa L. Sferra-Bonistalli*

Final Report: May 1, 2014

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.

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ADMINISTRATIVE CONFERENCE
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Executive Summary

This report examines legal and policy issues related to “*ex parte* communication” in informal rulemaking, defined to mean interactions, oral or in writing, between a public stakeholder and agency personnel regarding a rulemaking outside of written comments submitted to the public docket during the comment period. It describes how current *ex parte* communications usually occur as oral communications in face-to-face meetings, and identifies the value – actual and potential – and harm – real and perceived – of such communications. This report examines nine relevant D.C. Circuit cases, the Conference’s previous work on this topic in 1977, and eighteen agency policies. It illuminates the legal framework governing *ex parte* communications and identifies best practices that balance the potential value and harm of such communications.

This report’s major conclusions are:

- *Ex parte* communications are not prohibited in informal rulemakings.
- There are no legal requirements for handling *ex parte* communications occurring before publication of a notice of proposed rulemaking (“NPRM”).
- After an NPRM has been published in quasi-judicial or quasi-adjudicatory informal rulemakings, due process requires agencies to restrict or provide additional procedures to properly receive *ex parte* communications.
- *Ex parte* communications made after publication of an NPRM must be publicly disclosed, to ensure an adequate record for judicial review.
- Disclosing *ex parte* communications can allow agencies to balance the potential value and harm of such communications.
- The digital age has made disclosure of *ex parte* communications easier and more widely accessible, but has not otherwise affected such communications, which still occur mainly through in-person meetings.

This report begins in Part I by defining “*ex parte* communications” and “informal rulemaking.” Next, Part II addresses methodological issues, explaining how interviews with agency personnel and public stakeholders informed the report’s analysis and conclusions. Part III explores how current *ex parte* communications are made and why, and provides a summary of the potential value and harm of *ex parte* communications in informal rulemaking, as described by the D.C. Circuit, scholars, and agency personnel and public stakeholder interviewees.

Part IV of the report confirms that the Administrative Procedure Act (APA) is silent regarding *ex parte* communications in informal rulemaking, and distills key factors from relevant D.C. Circuit cases, including six cases in which *ex parte* communications were found permissible and three in which they were found problematic. This part also discusses the Conference’s previous recommendation on *ex parte* communications in informal rulemakings, which informed some agencies’ policies addressing *ex parte* communications in informal rulemaking.

Part V reviews the *ex parte* communication policies of eighteen agencies, as evidenced in rules, written policy, and unwritten policy. This examination reveals a spectrum of approaches to *ex parte* communications, with some agencies being more welcoming and others more restrictive.

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Attachment B
S-F Report Executive Summary

All agencies, however, require some disclosure of *ex parte* communications. This part identifies commonalities among the agencies' varying disclosure requirements and compares the policies of executive agencies with those of independent agencies.

Part VI summarizes the legal requirements for *ex parte* communications and concludes that agencies' policies should balance the potential value and harm of such communications. This part also discusses other legal considerations that may inform agency policy choices for best practices, and advocates disclosure of *ex parte* communications. Part VII examines whether the digital age raises new issues related to *ex parte* communications and explains that such communications made via social media is the main issue agencies must now consider.

Finally, Part VIII provides suggested recommendations to agencies regarding how to define, approach, and handle *ex parte* communications in informal rulemaking.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION**“Ex Parte” Policies**

1. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a written policy explaining how the agency handles what this recommendation refers to as nongovernmental “ex parte” communications, even if the agency does not use that term.

2. Agency ex parte policies should:

(a) Provide guidance to agency personnel on how to respond to requests for private meetings to discuss issues related to a rulemaking.

(b) Explain the scope of their coverage, which should be limited to communications on substantive matters and should exclude non-substantive inquiries, such as those regarding the status of a rulemaking or the agency’s procedures.

(c) Establish procedures for ensuring that, after an NPRM has been issued, the occurrence and content of all substantive oral communications, whether planned or unplanned, are included in the appropriate rulemaking docket.

(d) Establish procedures for ensuring that, after an NPRM has been issued, all substantive written communications are included in the appropriate rulemaking docket.

(e) Explain how the agency will treat significant new information submitted to the agency after the comment period has closed.

(f) Identify deadlines for all required or requested disclosures of ex parte communications.

(g) Explain how the agency will treat sensitive information submitted in an ex parte communication.



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Attachment C
ACUS Recommendation 2014-4

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(h) Explain how the agency's ex parte communications policy interacts with its comment policy.

3. In formulating policies governing ex parte communications in informal rulemaking proceedings, agencies should consider the following factors:

(a) The stage of the rulemaking proceeding during which oral or written communications may be received.

(b) The need to ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.

(c) Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings.

(d) The likelihood that protected information will be submitted to the agency through oral or written ex parte communications.

(e) The possibility that, even if an agency discourages ex parte communications during specified stages of the rulemaking process, such communications may nonetheless occur.

(f) The potential need to give agency personnel guidance about whether or to what extent to provide information to persons not employed by the agency during a face-to-face meeting.

Communications before an NPRM Is Issued

4. Agencies should not impose restrictions on ex parte communications before an NPRM is issued.

5. Agencies may, however, disclose, in accordance with ¶ 8 of this recommendation, the occurrence or content of ex parte communications received before an NPRM is issued, as follows:



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- (a) In the preamble of the later-issued NPRM or other rulemaking document; or
- (b) In the appropriate rulemaking docket once it is opened.

Communications after an NPRM Has Been Issued

6. If an agency cannot accommodate all requests for in-person meetings after an NPRM has been issued, it should consider holding a public meeting (which may be informal) in lieu of or in addition to individual, private meetings.

7. After an NPRM has been issued, agencies should disclose to the public:

- (a) The occurrence of all oral ex parte communications, including the identity of those involved in the discussion and the date and location of the meeting.
- (b) The content of all oral ex parte communications through a written summary filed in the appropriate rulemaking docket. Agencies may either:
 - (i) Direct their own personnel to prepare and submit the necessary summary; or
 - (ii) Request or require private persons to prepare and submit the necessary summary of meetings in which they have participated, although it remains the agency's responsibility to ensure adequate disclosure.
- (c) All written submissions, in the appropriate rulemaking docket.

Additional Considerations after the Comment Period Has Closed

8. Agencies should determine whether, and under what circumstances, ex parte communications made after the close of the comment period should be permitted and, if so, how they should be considered.

9. If an agency receives, through an ex parte communication, any significant new information that its decisionmakers choose to consider or rely upon, it should disclose the



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information and consider reopening the comment period, to provide the public with an opportunity to respond.

10. When an agency receives a large number of requests for ex parte meetings after the comment period has closed, it should consider using a reply comment period or offering other opportunities for receiving public input on submitted comments. See Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments* ¶ 6, 76 Fed. Reg. 48,791 (Aug. 9, 2011) (encouraging the use of reply comment periods and other methods of receiving public input on previously submitted comments).

Quasi-Adjudicatory Rulemakings

11. If an agency conducts “quasi-adjudicatory” rulemakings that involve conflicting private claims to a valuable privilege, its ex parte communications policy should clearly and distinctly articulate the principles and procedures applicable in those rulemakings.

12. Agencies should explain whether, how, and why they are prohibiting or restricting ex parte communications in quasi-adjudicatory rulemakings. Agencies may conclude that ex parte communications in this context require a different approach from the one otherwise recommended here.

13. Agencies should explain and provide a rationale for any additional procedures applicable to ex parte communications received in quasi-adjudicatory rulemakings.

Accommodating Digital Technology

14. Agencies should consider how digital technology may aid the management or disclosure of ex parte communications. For example, agencies may be able to use technological tools such as video teleconferencing as a cost effective way to engage with interested persons.

15. Agencies should avoid using language that will inadvertently exclude ex parte communications made via digital or other new technologies from their policies.



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16. Agencies should state clearly whether they consider social media communications to be ex parte communications and how they plan to treat such communications. Agencies should ensure consistency between policies governing ex parte communications and the use of social media.

MINOR DRAFTING POINTS

I. PROPOSED RULES

A. Section 3008.1 Applicability

Consider whether § 3008.1(e) should be revised to refer to "this part" rather than "this section."

B. § 3008.5 Prohibitions.

In § 3008.5(a), consider whether "is" should be changed to "are" for consistency with "Ex parte communications," which appears at the outset of this paragraph.

In § 3008.5(b), consider whether "or data" should be added after "any information".

C. § 3008.6 Required action upon ex parte communications and
§ 3008.7 Penalty for violation of ex parte communication rules

In § 3008.6(b), the phrase "who make or knowingly cause to be made" appears. In § 3008.7(a), the phrase "*knowingly made* or knowingly caused to be made" appears. (Emphasis supplied.) Consider harmonizing the wording of these paragraphs either by adding "knowingly" in § 3008.6(b) or dropping "knowingly" in § 3008.7(a).

D. Conforming Change

Section 3001.20b concerns limited participators. In § 3001.20b(d), captioned "Ex parte communications—exception," there is a cross-reference to § 3001.7. The Commission proposes to remove and reserve § 3001.7. Consider updating this reference to refer to reflect new part 3008.

II. POLICY

A. Onus versus Primary Onus

In the Policy at 8, reference is made to both "onus" and "primary onus." Consider changing "primary onus" to "onus."

B. List of Dockets

In the Policy at 4-5, there is a list of dockets. On February 8, 2016 (after issuance of the Docket No. R2016-4 rulemaking), a rule re-instituting the International Mail (IM) docket designation was finalized. Consider including IM dockets in this list.